

***United States Court of Appeals
for the Second Circuit***

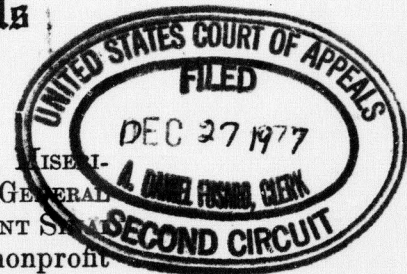


**APPELLANT'S
REPLY BRIEF**

ORIGINAL

12-27-77
77-6152

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT



HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISER-
CORDIA HOSPITAL MEDICAL CENTER, BUFFALO GENERAL
HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI
HOSPITAL on behalf of themselves and all other nonprofit
hospitals which are members of the HOSPITAL ASSOCIA-
TION OF NEW YORK STATE, INC., and which are reim-
bursed for Medicaid Services rendered to hospital
patients,

Plaintiffs-Appellants,

—v.—

PHILIP L. TOIA, as Commissioner of Social Services of the
State of New York, ROBERT P. WHALEN, as Commis-
sioner of Health of the State of New York, PETER
GOLDMARK, as Director of the Budget of the State of
New York, HUGH L. CAREY, as Governor of the State of
New York,

Defendants-Appellees,

—and—

F. DAVID MATHEWS, as Secretary of the United States
Department of Health, Education and Welfare,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
HOSPITAL ASSOCIATION OF NEW YORK STATE, :
INC., MISERICORDIA HOSPITAL MEDICAL :
CENTER, BUFFALO GENERAL HOSPITAL, THE :
GENESEE HOSPITAL, and THE MOUNT SINAI :
HOSPITAL on behalf of themselves and all :
other nonprofit hospitals which are mem- :
bers of the HOSPITAL ASSOCIATION OF NEW :
YORK STATE, INC., and which are reim- :
bursed for Medicaid Services rendered :
to hospital patients, :

Plaintiffs-Appellants, :

-against- :

PHILIP L. TOIA, as Commissioner of :
Social Services of the State of New :
York, ROBERT P. WHALEN, as Commissioner :
of Health of the State of New York, :
PETER GOLDMARK, as Director of the :
Budget of the State of New York, HUGH :
L. CAREY, as Governor of the State of :
New York, :

Defendants-Appellees, :

-and- :

F. DAVID MATHEWS, as Secretary of the :
United States Department of Health, :
Education & Welfare, :

Defendant. :

Docket No.
77-6152

-----X
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

In its opinion below (684-716) the District Court
acknowledged that there was nothing in the legislative history

of the repealer to indicate the congressional intent as to pending lawsuits (694-698). The Court found that the most that could be ascertained from the legislative history was that Congress intended to eliminate the ten-percent penalty provision and the waiver of immunity requirement (id).

The Court's conclusion that the repealer applied to pending litigation was based upon its determination that any other construction would create the "anomaly [sic] of penalizing those states, such as New York, which complied with the original federal command by waiving immunity (though under protest) while rescuing from possible liability the disobedient states who refused in the first instance to obey the Congressional command to waive immunity" (698-699). The Court acknowledged that a countervailing consideration might apply where a State had voluntarily consented to suit, but determined that in this case consent under the Medicaid Act was not voluntary in the usual constitutional sense, and, hence, would not require consideration of New York's consent in assessing the effect of the repealer. (700-701).

In our main brief we demonstrated the error in these assumptions of the District Court. (Plaintiffs' Brief, pp. 19-41.) Nonetheless, in our answering brief the State Defendants have essentially repeated these arguments and have offered only a half-hearted and inadequate response to the

issues we raise. Specifically, they fail to show that New York's consent to suit was anything but voluntary in a constitutional sense. Further, they decline to answer our argument that, once such consent has been given, there is a compelling principle of law against permitting the State to withdraw from the litigation at its convenience. Also, they offer no rebuttal of our argument that that principle must govern the construction of the admittedly inconclusive language of the repealer.

Nor do the State Defendants offer any real answer to our point that to construe the repealer as they read it would be to deny the hospitals a property right without due process of law. Rather, they merely present as "authority" a series of inapposite cases in an ineffective attempt to undermine what remains the controlling decision of the Supreme Court on this question.

Finally, the State Defendants offer a group of cases said to require restitution of the money paid pursuant to the August 2, 1976 judgment, although they concede that equitable considerations are applicable to restitution. As we show, the District Court did have discretion to refuse restitution.

ARGUMENT

POINT I

PUBLIC LAW NO. 94-552 DOES NOT
PERMIT THE STATE TO WITHDRAW
ITS CONSENT TO SUIT IN THIS CASE.

A. The Terms of The Repealer Statute.

The State Defendants argue that the plain meaning of the repealer requires the result they seek. Thus, they contend (State Defendants' Brief, p. 16) that the retroactivity of the repeal of the waiver provision was designed to undo all effects of the original statute and that this result can only be achieved by applying the repealer to pending cases. The simple answer is that such an objective can be achieved by applying the repealer retroactively to all acts or omissions by state officials that, at the time of the repealer, had not been made the subject of suit. In this way, the States would be freed of the burden of further litigation, as purportedly desired by Congress, yet effect would be given to the countervailing consideration that lawsuits against States predicated upon voluntary consent should not be subject to dismissal at the will of the State.

Another "plain meaning" argument advanced by the State Defendants is that the retroactive repeal of the waiver provision was not necessary to avoid sanctions against non-complying States, because that result could have been achieved

simply by repealing retroactively the ten-percent penalty provision. This argument rests (1) on the State Defendants' unsupported interpretation of 42 U.S.C. §1396c, the general sanction provision of the Medicaid Act, which they claim would not apply to a State's refusal to waive immunity and (2) on the assumption that Congress consciously considered the interaction between section 1396c as construed by the State Defendants and the ten-percent penalty provision. In plain fact, nothing about the effect of the repealer on pending litigation can be deduced from the retroactivity of the repealer of the waiver provision.

B. Legislative History.

The State Defendants proffer an extensive discussion of the legislative history to support their argument that the retroactivity of the repealer was intended to extinguish pending cases. Yet nothing in that legislative history expressly refers to pending litigation; the most that could be inferred is that Congress wished to prevent such litigation in the future, which would be evidenced by the enactment of the repealer itself. Indeed, as explained above, the District Court went no further than this conclusion in its reading of the legislative history (694-698). The mere recitation by the State Defendants of congressional debates containing no references to the particular problem at bar proves nothing. The inferences drawn from general language in the legislative

history are irrelevant for "legislative intention, without more, is not legislation." Train v. City of New York, 420 U.S. 35, 45 (1975).

C. Applicable Case Law.

Rather, the District Court based its conclusion upon its determination that there would be an anomaly if New York were held bound by its consent, while States that had refused consent were held harmless by the repealer (698). But we explained in our main brief (p. 30) that holding New York to its considered decision to waive its immunity in exchange for additional federal aid would not, on the authority of Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir.), cert. denied, 46 U.S.L.W. 3261 (1977), result in such an anomaly. That case held New York State bound to comply with complex Clean Air Act standards to which the State had previously consented, despite the fact that defiant States were ultimately successful in avoiding by legal challenges virtually all responsibility under the statute.

The State Defendants attempt to distinguish Friends of the Earth (State Defendants' Brief, p. 22n.) on the ground that, unlike this case, New York State's consent there was not given under protest.* The State Defendants are apparently

* See p. 8, infra.

ignorant of the history of Friends of the Earth, because in fact the State's consent there was given with the express reservation that adequate federal funds be provided, though the Clean Air Act specifically required the State to give assurances of adequate funding. See Friends of the Earth v. EPA, 499 F.2d 1118, 1126 (2d Cir. 1974).

Nor do the State Defendants answer our point that New York State's consent was voluntary in a constitutional sense. It must be remembered that it was the District Court's view that if such consent were voluntary, it would be a countervailing consideration to be weighed against the presumption that consent could be retracted in a pending case (700-701). Rather, the State Defendants merely make a weak attempt to distinguish the cases discussed in our main brief (pp. 26-28).

Thus, they argue that Steward Machine Co. and Bekins are inapposite because no statutory penalty was involved. But it is clear from both cases that the operative consideration was whether the State's consent was "coerced" by economic duress, just as the State claims here that its consent was given under the economic duress of the ten-percent penalty provision. The State Defendants' distinction of Oklahoma v. Civil Service Commission is simply wrong. Nowhere in that decision did the Supreme Court accept Oklahoma's characterization of the federal law as having a "coercive effect", or treat Oklahoma's action - ignoring a federal threat of reduction in state aid - as "coerced".

Consequently, the State Defendants utterly fail to blunt the thrust of our argument. To reiterate, it is our position that because this case involves immunity from suit under the Eleventh Amendment, the presumptions that might be applied to ordinary jurisdictional legislation under Article III of the Constitution are not automatically applicable here. Because under the Eleventh Amendment a State may confer jurisdiction upon the federal court by consent, there are countervailing considerations arising from such consent that require an analysis different from that arguably applicable in the usual jurisdictional case.*

With regard to the case at bar, the voluntariness in a constitutional sense of New York's consent is significant, for it is a controlling principle (conceded by the State Defendants) that in such instances the State will not be permitted to withdraw its consent in the course of the litigation. That controlling principle should prevail here over any presumption that might be applicable to ordinary jurisdictional legislation. Waiving immunity "under protest" preserved no rights (418).**

* Moreover, the Court should not presume that Congress intended to nullify governmental consent to suit, where nullification would have the effect of destroying a property right. Cf. Lynch v. United States, 292 U.S. 571, 586-87 (1934).

** See also, United States v. The Thekla, 266 U.S. 328, 338, 341 (1924) (where the United States moved to intervene as a claimant, "'without submitting itself to the jurisdiction' of the Court"; held, that it was still subject to "whatever liability" the Court imposed).

When Congress originally enacted the waiver provision, presumably it expected that consents to suit would be given and that litigation would ensue. Here, New York State made a considered decision to give such consent based upon an assessment of its economic self-interest. It must be remembered that the State was not compelled to give such consent; the inducement of higher Medicaid reimbursement prompted the State's decision. Other States chose to refuse consent and challenge the waiver provision of the Medicaid Act (697). New York State, however, voluntarily determined to give its consent, consistent with its policy of satisfying any requirements for federal grants under the Social Security Act. See New York Public Health Law, Section 701(c).

It is not unreasonable to expect that when Congress enacted the repealer, it would have spoken directly and plainly on the special problems raised by pending actions if the repealer had been intended to affect those suits. But there is nothing in the language of the statute that clearly supports such a construction. And the legislative history is mute on this question, as the District Court found (694). Accordingly, absent any definitive expression of legislative intent to the contrary and in light of the principle against withdrawals of consent, the State Defendants should not be permitted to escape the consequences of a lawsuit to which the State consented as part of a considered decision to do whatever

was required to maximize the federal Medicaid grant to New York State.

D. Manifest Injustice and Estoppel

The State Defendants raise no significant arguments and no new authority in opposition to the points made by the hospitals on the issues of manifest injustice and estoppel.* (Plaintiffs' Brief, pp. 38-41 and 49-53.) They contend that the statute was, by its terms, made retroactive, thereby avoiding the manifest injustice question. On the contrary, manifest injustice is relevant, where, as here, Congress did not clearly intend the new law to apply to pending cases. See Bradley v. School Board, 416 U.S. 696, 712-13, 721 (1974).

The further suggestion is made (State Defendants' Brief, pp. 31-32) that New York State will suffer a manifest injustice if the money judgment is restored. In effect, the State Defendants claim that it is grievously inequitable that they should be ordered to make the injured parties whole after an adjudication that they flouted federal law. There is little injustice in such a result.

* The State Defendants "explain" their failure to advise the District Court of the enactment of the repealer by claiming that they did not learn of the legislation until November 15, 1976 (State Defendants' Brief, p. 37). But Appendix B of their brief shows that HEW notified them of their right to withdraw the waiver three weeks earlier - before entry of the November 9, 1976 order. Of course, if the hospitals "were undoubtedly aware" of the repealer in May, 1976 (State Defendants' Brief, p. 54), so, undoubtedly, was the State.

To the contrary, a gross inequity would result if the State were allowed to withdraw from this case now. This Court should apply the salutary principle against allowing a sovereign to decide a case in its own favor by the exercise of such a "prerogative". See, United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872).

On estoppel, the State Defendants' theory is that because the hospitals must or should have been aware of the prospect that a repealer would be passed (applying a kind of caveat emptor rule to Acts of Congress), the judgment issued pursuant to the State's consent to suit may be retroactively nullified.

The hospitals were fully justified in acting on the basis of the law as it stood. As the Supreme Court has explained, citizens "cannot foresee and ought not to be required to guess the outcome of pending measures." Untermeyer v. Anderson, 276 U.S. 440, 445-46 (1928). (See Plaintiffs' Brief, p. 50n.) As was pointed out above and in our main brief (p. 27), the State's waiver "under protest" was perfectly valid and binding in a constitutional sense, and its purported "protest" is of no effect. Supra, p. 8.

POINT II

UNLESS THE AUGUST 2, 1976 JUDGMENT IS
REINSTATED, PLAINTIFFS WILL BE DEPRIVED
OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In our main brief (pp. 54-61) we demonstrated that under the holding of McCullough v. Commonwealth of Virginia, 172 U.S. 102 (1898), a construction of the repealer permitting New York State to withdraw its consent to suit retroactively to defeat the August 2, 1976 money judgment would violate due process of law. Although the State Defendants endeavor to undermine the holding in McCullough, they fail to offer a single decision of the Supreme Court that overrules the controlling principle in McCullough that is dispositive here.

Indeed, in discussing McCullough, the State Defendants concede that the decision "is stated in terms of the rights arising from the lower court's judgment" (State Defendants' Brief, p. 45), but argue that McCullough nevertheless means something else (*id.*). Thus, they rely on Oshkosh Waterworks Co. v. City of Oshkosh, 187 U.S. 437 (1903), for the purported proposition the McCullough only deals with impairment of obligations of contract. But it is clear from reading Oshkosh that its discussion of McCullough never touched upon the portion of the latter decision applicable to this case. Accordingly, Oshkosh in no way limits McCullough in the fashion suggested by the State Defendants.

F.H.A. v. The Darlington, Inc., 358 U.S. 84 (1958), is equally inapposite. No money judgment was involved in that case. Rather, all that was in issue was the power of Congress to affect, by legislation, the future rights of those engaged in business in a regulated field.

Similarly, in Fleming v. Rhodes, 331 U.S. 100 (1947), enforcement of the state court judgment required future conduct by the landlord concededly subject to Congress' regulatory powers. It is noteworthy that in Fleming v. Rhodes the Court emphasized that the judgment itself was not affected by the congressional enactment, but merely that the conduct required to perfect rights under the judgment came within the scope of Congress' powers.

Nor is there any support to be found in Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). As the State Defendants acknowledge in their discussion of the case, the statute in question was enacted before the plaintiffs' claim had been reduced to judgment.* Likewise, in Lynch v. United States, 292 U.S. 571 (1934), the Court merely stated in dictum that consent

* Insofar as the State Defendants may be suggesting that Congress' powers to control the jurisdiction of federal courts may be exercised to override vested property rights (State Defendants' Brief, p. 46), Battaglia makes clear that the Fifth Amendment is applicable in these situations as well. 169 F.2d at 261.

to sue the United States did not create a vested right, not that a resulting judgment would not be a property right.*

The arguments advanced in support of the contention that no substantial constitutional issue can be advanced under the circumstances of the case (State Defendants' Brief, pp. 52-56.) are preposterous. Not only was the "underlying law" not "uncertain" when the August 2, 1976 judgment was entered, but it was so clear that the District Court was impelled to characterize the State Defendants' conduct as having been "in blatant disregard" (713) of federal law. And the claim that the hospitals' right to retroactive relief was not determined until after the District Court's jurisdiction was extinguished is spurious. New York State's consent to suit remained in effect until December 8, 1976 (State Defendants' Brief, Appendix B), long after the District Court's order of November 9, 1976.

* The State Defendants' "distinction" of United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (State Defendants' Brief, p. 52) is immaterial. The operative fact there was that Congress had attempted to take away property rights that had been restored by Executive pardon.

POINT III

THE COURTS ARE EMPOWERED TO MAKE
SUCH ORDERS AS JUSTICE REQUIRES
WHEN JURISDICTION IS LOST AFTER
A JUDGMENT HAS BEEN RENDERED.

The hospitals have explained why this case should be remanded for reconsideration of the District Court's restitution order, even if this Court holds that the State's retraction of its waiver retroactively restored its immunity to suit. (Plaintiffs' Brief, pp. 62-65.) The District Judge ordered restitution by the hospitals upon the erroneous assumption that he was required by law to do so.

The State defendants respond that the hospitals' cases are inapposite and that once jurisdiction is withdrawn a court may only vacate previously entered orders, dismiss the proceeding and prevent a successful plaintiff from retaining the benefit of his judgment. The Atlantic Coast Line case offered by the State Defendants is not, however, authority for this argument. (State Defendants' Brief, p. 58.) That case holds only that a court whose jurisdiction over a case rests on a statute must apply the same criteria for ordering restitution as an ordinary court of equity. 295 U.S. at 310-11, 314. It certainly does not stand for the proposition that equitable considerations must be ignored where one of the parties to the suit acts to deprive the court of jurisdiction.

Contrary to the State Defendants' contention, where jurisdiction over a case is lost after a determination by a trial court, the court recognizing the loss of jurisdiction is not restricted in the manner suggested by the State Defendants. Thus, as to cases which have become moot during appeal, thereby extinguishing the constitutional jurisdiction of the court, it has been said:

"If a judgment has become moot, this Court may not consider its merits, but may make such disposition of the whole case as justice may require." Labor Youth League v. Subversive Activities Control Board, 322 F.2d 364, 374 (D.C. Cir. 1963), quoting from Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944) (emphasis added).

There is no logical distinction between cases where jurisdiction is lost by subsequent statutory changes, as opposed to mootness. The principle enunciated in Labor Youth League is thus equally apposite here.

In all of the cases cited by the State Defendants, the orders appealed from were void when issued, the issuing court never having had jurisdiction. The equities in such a situation are, of course, much different from the instant case. Where a plaintiff brings a defendant before a court not having jurisdiction from the inception of the case, preservation of a judgment in plaintiff's favor would be questionable on grounds of equity as well as law. Where, as here, a lawsuit is properly brought and a judgment is

properly entered, a subsequent ousting of the court's jurisdiction, especially by the unilateral action of one party, presents a wholly different set of circumstances. In this latter case it is entirely reasonable for the District Court, in the exercise of its equitable powers, not to undo the effect of its judgment, which was lawful when entered.

POINT IV

THE STATE DEFENDANTS' CLAIM
THAT THE DISTRICT COURT IM-
PROVIDENTLY EXERCISED ITS
GENERAL EQUITY JURISDICTION
CANNOT BE SUSTAINED.

The State Defendants attempt to revive their old claim that the August 2, 1976 judgment was an abuse of discretion. (State Defendants' Brief, pp. 59-60.) As we showed in the previous appeal in this case, the judgment was absolutely correct and, moreover, the State Defendants waived this claim by failing even to suggest to the District Judge that he refrain, in his discretion, from entering the judgment. Plaintiffs-Appellees' Answering Brief, Docket No. 76-6117 (filed January 17, 1977), pp. 34-39. We incorporate our arguments there on this appeal.

The State Defendants' argument in their Reply Brief in No. 76-6117 that the repealer eliminated the explicit congressional direction that retroactive payments be awarded (see Rothstein v. Wyman, 467 F.2d 226, 235 [2d Cir. 1972], cert. denied, 411 U.S. 921 [1973]) is illogical. If our construction of the repealer is correct, it obviously continued that direction as to pending cases.

CONCLUSION

For the foregoing reasons, the order of the District Court vacating its judgment of August 2, 1976, insofar as that judgment granted monetary relief, should be reversed in all respects.

Dated: New York, New York
December 27, 1977

Respectfully submitted,

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On December 27, 1977 , I served the attached

Reply Brief upon the following
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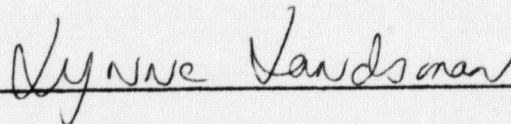
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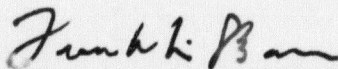
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Lynne Landsman

Sworn to before me this
27th day of December , 1977.


Notary Public

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Notary Public, State of New York
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